

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

FILE: B-219243

DATE: October 22, 1985

MATTER OF: Terex Corporation

DIGEST:

1. Where a request for proposals sets forth precise design characteristics of a brand name product under a brand name or equal solicitation those features are presumed to be material and essential to the needs of the government and must be met by an offeror.
2. A brand name or equal solicitation which describes various aspects of a particular product's design as required characteristics should not be viewed as expressing a performance requirement that can be satisfied by other design approaches which perform the same function.

Terex Corporation has protested the rejection of its low price proposal as technically unacceptable in the procurement of crawler tractors for the Department of Energy (DOE) under request for proposals (RFP) No. K-348120-MS issued by Rockwell Hanford Operations, a prime contractor of DOE. Terex contends that Rockwell improperly rejected as technically unacceptable the Terex D800 tractors which it offered in favor of the higher-priced offer by Inland Machinery Co. of Caterpillar D8L tractors. The protester asserts that the products offered in its proposal fully satisfy or exceed all the performance requirements set forth in the brand name or equal solicitation.

The protest is denied in part and dismissed in part.

The agency advises that through its Richland Operations Office it is responsible for the management of an area in Washington State commonly called the Hanford Site, where nuclear related activities are conducted. Richland implements its management responsibility over the

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conduct of the various nuclear activities through contracts with eight commercial business organizations. The contractual activities of Rockwell, one of the DOE management and operating contractors at the Hanford Site, are involved in this protest.

On February 27, 1985, Rockwell issued RFP No. K-348120-MS for eight crawler tractors, the procurement of seven of which has been protested by Terex. Rockwell's solicitation, although headed "Invitation for Bid," stated on the first page:

"THIS IS A REQUEST FOR PROPOSAL CONTEMPLATING NEGOTIATIONS PRIOR TO AWARD. HOWEVER, PROPOSALS SHOULD BE SUBMITTED INITIALLY ON THE MOST FAVORABLE PRICE AND TECHNICAL TERMS WHICH CAN BE OFFERED BECAUSE OF THE POSSIBILITY THAT AWARD WILL BE MADE WITHOUT DISCUSSION OF PROPOSALS RECEIVED."

The RFP specifications provided in pertinent part as follows:

"Minimum Requirements."

"Tractors, crawler, fully tracked . . . hydraulic dozer blade. Caterpillar D8L, or approved equal to meet the minimum requirements attached hereto and made a part hereof."

The attached "minimum requirements" for these tractors, RFP items 1 through 4, consisted of over three pages of specific characteristics predominately expressed in terms of the design, rather than the performance, of the tractor. The RFP further advised offerors:

"THE USE OF BRAND NAMES IN THIS INQUIRY IS INTENDED TO BE DESCRIPTIVE AND TO INDICATE THE QUALITY AND CHARACTERISTICS OF PRODUCTS THAT WILL BE SATISFACTORY. IF THE OFFEROR PROPOSES TO FURNISH AN EQUAL PRODUCT, THE BRAND NAME OF SUCH PRODUCT SHALL BE CLEARLY IDENTIFIED IN THE OFFER. THE DETERMINATION AS TO EQUALITY OF THE PRODUCT OFFERED SHALL BE THE RESPONSIBILITY OF THE BUYER, BASED ON INFORMATION FURNISHED BY THE OFFEROR. TO ENSURE THAT SUFFICIENT INFORMATION IS AVAILABLE FOR EVALUATION, THE OFFEROR MUST

FURNISH, AS A PART OF HIS OFFER, ALL DESCRIPTIVE MATERIAL (SUCH AS CUTS, ILLUSTRATIONS, DRAWINGS, OR OTHER INFORMATION) NECESSARY FOR THE BUYER TO [1] DETERMINE WHETHER THE PRODUCT OFFERED MEETS THE REQUIREMENTS OF THE INQUIRY AND [2] ESTABLISH WHAT THE BUYER WOULD BE BINDING ITSELF TO PURCHASE."

Terex offered its model D800 tractor as an "equal" product for items 1 through 4. In its proposal, which consisted solely of a copy of the solicitation, Terex addressed the equality of its D800 tractor by typing notations adjacent to most of the specification requirements. Although in some instances, Terex entered nothing on the solicitation schedule, in others it entered figures (representing such characteristics as dimensions, weights, and fluid capacities), the legend "Not Applicable," or narrative notations. While some of the figures Terex entered equalled or exceeded specification requirements, others did not. The entry "Not Applicable" has been understood to mean that Terex did not propose to furnish that specific feature (an interpretation the protester does not dispute), and most of Terex's narrative notations directly conflicted with the specification requirements beside which they were written.

For example, adjacent to the specification requirement "Engine/Torque divider, module isolated to main frame to reduce vehicle vibration and structure radiated noise," Terex entered the notation "Not Applicable." With regard to the transmission, in response to the solicitation's "minimum requirement" for a "Single stage torque converter with output torque divider," Terex inserted the comment "Output Torque Divider Not Applicable." Similarly, in section E of the specifications, which concerned the "Track Roller Frame", section E7 provided that "Pivot bushings shall operate in oil reservoir." Terex stated after specification E7 "Sealed Grease Bushings." Terex's proposal indicated that the tractors which it offered deviated from the solicitation's minimum requirements with regard to numerous other specifications as well. In all, Rockwell's evaluation of Terex's proposal indicates that Terex failed to meet the specifications with regard to approximately 17 requirements.

Terex contends that its proposal should have been deemed technically acceptable on two grounds. First, Terex asserts that some of the specification requirements, such as an isolated engine/torque divider, are

merely proprietary design features of the Caterpillar D8L tractor which have no operational function. Terex contends that its tractor, although of a different design, complies with the desired "functions" represented by the other specifications with which its tractor is at variance. For example, although as stated above, the solicitation specifications require in connection with the track roller frame that the pivot bushings operate in an oil reservoir, Terex asserts that its tractor performs the same function with sealed grease bushings.

Technical requirements which are stated in clear and unambiguous terms are presumed to be material and essential to the needs of the government. Squibb-Vitatek, Inc., B-205306, July 27, 1982, 82-2 CPD ¶ 81 at 4. When a brand name product is described in terms of precise design or performance characteristics, the equal product must meet these requirements precisely. Id. We have specifically denied the contention that a brand name or equal solicitation describing various aspects of a particular product's design as required characteristics should be interpreted as expressing a performance requirement that can be satisfied by other design approaches which perform the same function. MII Lundia, B-214715, Jan. 3, 1985, 85-1 CPD ¶ 14, and Castle/Division of Sybron Corp., B-219056, Aug. 7, 1985, 85-2 CPD ¶ 142. When a solicitation sets forth particular features of the brand name items these features are presumed to be material and essential to the government's needs. See Western Graphtec, Inc., B-216948; B-217353, Apr. 2, 1985, 85-1 CPD ¶ 381. Accordingly, Rockwell's rejection of Terex's proposal as unacceptable was proper because the product offered by Terex did not conform to many of the required design and performance characteristics set forth in the RFP's specifications. See TEAM Corp., B-218584, June 27, 1985, 85-1 CPD ¶ 734.

To the extent that Terex's protest relates to its belief that the solicitation is unduly restrictive because it unnecessarily specifies features which are proprietary to Caterpillar, the protest is untimely. Under our Bid Protest Regulations, protests based upon improprieties apparent in a solicitation must be filed before the closing date for receipt of initial proposals. 4 C.F.R. § 21.2(a)(1); TEAM Corp., B-218584, supra, 85-1 CPD ¶ 734 at 3.

The protester has also objected to the agency's determination that the tractor which it offered for items No. 1 and 2 was technically unacceptable because the bulldozer blade which it offered with the Terex tractor did not meet the maximum tilt requirements set forth in the solicitation. We need not consider this issue because the D800 tractor offered by Terex failed to meet the required characteristics of the tractors specified in the brand name or equal solicitation. Where one reason for the rejection of a proposal is proper, as we have determined above, the protester's allegations regarding another such reason are academic. TEAM Corp., B-218584, supra, 85-1 CPD ¶ 734 at 2.

Similarly, we need not consider Terex's contention that Rockwell erroneously deemed acceptable the coal blade which Inland offered under item No. 4 because that blade allegedly does not meet the specification requirements as to dimensions and weight. In view of the deficiencies in Terex's proposal which would have precluded an award to it, it was not prejudiced by Rockwell's acceptance of the blade offered by Inland.

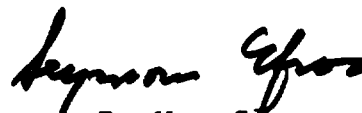
The protester has also implied that Rockwell may have acted in bad faith in rejecting its proposal. Terex asserts that the rejection of its offer was unfair and arbitrary and that Rockwell's definition of "technically qualified" may be limited to a specific make and model supplied by a local dealer alleged by Terex to be favored by Rockwell. A showing of bad faith or bias requires undeniable or irrefutable proof that the procuring activity had a malicious and specific intent to injure the party alleging bad faith. Furthermore, we will not find a discretionary action to be biased or arbitrary if the record indicates a reasonable basis for such action. See CMI Corp., B-209938, Sept. 2, 1983, 83-2 CPD ¶ 292. Terex's bare allegation of bad faith or arbitrary action by the procuring activity is, of course, insufficient to meet the heavy burden of proof imposed on a party who makes such allegations.

Finally, Terex suggests that it may have been improperly denied the procurement in question because it is under the protection of Chapter 11 of the federal bankruptcy laws. This allegation is without merit. As set forth above, Terex's proposal was properly rejected on the basis that it was technically unacceptable. Furthermore, the agency advises that due to the technical deficiencies in Terex's offer, Rockwell did not even consider

the matter of Terex's responsibility and Rockwell advises that it was not aware of the protester's Chapter 11 status until Terex mentioned it in its protest.

Finally, we note that in a supplemental protest letter filed with our Office on June 27, 1985 Terex contends that the fact that it was furnished a copy of the solicitation by Rockwell shows that the tractors which it proposed to offer were "prequalified" as technically acceptable. This issue is untimely and will not be considered by this Office since it was presented to our Office more than 10 working days after June 12, 1985--the date on which Terex states that it received written notice of the rejection of its proposal. See Waukesha Engine Division of Dresser Industries, Inc., B-215265, June 24, 1985, 85-1 CPD ¶ 711 and 4 C.F.R. § 21.2(a)(2).

Accordingly, the protest is denied in part and dismissed in part.

for 
Harry R. Van Cleve
General Counsel